No. 78-872

In the Supreme Court of the United States

OCTOBER TERM, 1978

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. The court of appeals set aside an order of the Interstate Commerce Commission. The Commission had found that the railroad rate structure does not discriminate against recycled or recyclable materials ("recyclables") in favor of virgin natural resource materials and that most of the rates for recyclables were reasonable.[1]

The Commission's order was issued pursuant to Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 40. Section 204 directed the Commission to conduct an investigation

[1] *Ex parte No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials*, 356 I.C.C. 144 (1977); Pet. App. D.

into the rail rate structure for recyclables and competing virgin natural resource materials, and to consider the manner in which that rate structure has been affected by successive general rate increases. The Commission was directed to determine whether the rate structure was discriminatory or unreasonable and, if it was, to remove any such discrimination or unreasonableness.

The court of appeals held that the Commission's approval of the rate structure was not consistent with the mandate of Section 204 (585 F. 2d 522; Pet. App. B). The foundation for the court's decision was its conclusion that the Commission had not adequately addressed the focal question presented by its investigation—whether the substantial rate disparties between recyclables and virgin products are justified, in whole or in part, by the transportation characteristics of the products involved. The court also concluded that the Commission effectively relieved the railroads of their statutory burden of proof under Section 204 (Pet. App. 29b-30b).[2] Because the court of appeals found that the Commission's decision was not an adequately reasoned compliance with the mandate expressed in Section 204, it vacated the order and remanded the case for further proceedings.

2. Petitioners argue (Pet. 12-17) that the court of appeals substituted its judgment for that of the Commission. They contend that the court simply reweighed the evidence before the Commission and reached a result contrary to that of the Commission. We disagree. In our view the court applied established principles of judicial review to a particular adminstrative decision. The court explicitly stated that neither its discussion of the standards employed by the Commission to determine the

[2]Section 204 shifted the traditional burden of proof, which requires the shippers to prove the rate structure is discriminatory or unreasonable, and instead required the carriers to prove that the rate structure is not discriminatory or unreasonable.

lawfulness of the rate structure nor its discussion of the railroads' evidence was intended to state the court's view of the lawfulness of any of the rate structures involved (Pet. App. 45b). As the court stated, "[t]hey may be lawful, or they may not" (*ibid*). The court also avoided telling the Commission what measures the Commission should adopt in prescribing either maximum rates on recyclables or maximum rate disparties between recyclables and virgin products. The court left resolution of these questions to the "informed judgment of the Commission" (*ibid.*).

We therefore believe that the decision will not have a significant unwarranted effect on the Commission's administration of the Act. The court rejected the shippers' contention that Section 204 represented a congressional declaration that recyclables and virgin commodities compete for transportation purposes (Pet. App. 21b n.44). Indeed, the court found that, although the competition issue was important, it was "not the main concern leading Congress to require" the Section 204 investigation (Pet. App. 41b). Rather, the court concluded, Congress' major concern was the removal of rate structures that impeded or discouraged development of industrial recycling. In light of this dominant purpose—coupled with the absence of any statutory reference to a standard of competition—the court declined to conclude that Section 204 directs the Commission to make positive findings that the two types of commodities compete for transportation purposes, or that Section 204 prescribes any particular standard of competition to be applied in the investigation.[3]

[3]As the court noted (Pet. App. 40b), the Commission "applied a standard of competition requiring a showing that recyclable products were substitutable for, rather than functionally equivalent with, virgin products in the manufacture of industrial products." Although the court found that Congress had not enacted any particular standard, it did require the Commission to consider potential, as well as actual, competitive effects (Pet. App. 42b-43b).

The court also rejected the argument that Section 204 requires the Commission to weigh environmental goals more heavily than traditional transportation policy criteria (Pet. App. 21b n.44). The court found, to the contrary, that Section 204 does not modify the substantive standards relating to the lawfulness of rates (Pet. App. 25b-26b). As the court stated (Pet. App. 26b):

> Congress used familiar language, having a long-settled meaning in transportation law, in proscribing "unreasonableness" and "unjust discrimination" in rate structures. It is apparent from use of such terms that Congress deemed traditional transportation policy criteria adequate protection against rate structures which discouraged industrial use of recycled product.

Because the Commission does not take issue with the court of appeals' construction of the Act, and because the court's decision will have no substantial effect on the Commission's administration of the Act, the decision does not raise the kind of legal issues or have the kind of practical implications that warrant plenary review by this Court.[4]

3. Petitioners also contend (Pet. 17-21) that the court of appeals improperly imposed a six-month time limitation on the Commission's proceedings on remand.[5] Although the Commission does not believe that such time limits are appropriate,[6] the Commission reopened these proceedings

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[4]There is, in any event, no need for this Court to consider the issues raised by petitioners now. If petitioners do not ultimately prevail after the remand, they may present all their contentions to this Court when seeking review of the final decision of the court of appeals.

[5]According to the court's *per curiam* decision of October 16, 1978 (Pet. App. C), the Commission has until April 15, 1979, to complete the proceedings on remand.

[6]See, *e.g.*, *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976).

on December 18, 1978, and directed the parties to complete their evidentiary submissions within a time calculated to assure completion of the administrative proceeding on remand within six months. The Commission intends to comply with the court of appeals' mandate and to complete the proceedings by April 15, 1979. Accordingly, the government has not sought review by this Court of the six-month time limitation imposed by the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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